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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-415

PORTLAND CEMENT ASSOCIATION,
Petitioner,

v.

RUSSELL E. TRAIN, ADMINISTRATOR,
ENVIRONMENTAL PROTECTION AGENCY, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the
District of Columbia Circuit

MOTION FOR LEAVE TO FILE AND BRIEF OF THE NATIONAL ASSOCIATION OF MANUFACTURERS, AS AMICUS CURIAE, IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

NATIONAL ASSOCIATION OF MANUFACTURERS
OF THE UNITED STATES OF AMERICA

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The National Association of Manufacturers hereby respectfully moves for leave to file the accompanying brief as *amicus curiae* in this case. The consent of the Attorney for the Petitioner has been obtained. The consent of the Attorneys for the Respondents was requested but no reply was received.

The National Association of Manufacturers (NAM) is a nonprofit voluntary business organization, organized as a membership corporation under the laws of the State of New York. It is composed of approximately 13,000 manufacturing and related concerns of all sizes located throughout the United States. Because of the broad scope and application of the Clean Air Act (42 U.S.C. §1857 *et seq.*) a substantial number of NAM member concerns are subject to the provisions of the Act and will be directly affected by the decision in this case.

In the interest of its membership, the NAM has appeared as *amicus curiae* in suits of significant national concern. For example, the Supreme Court granted the NAM's motion for leave to file a brief *amicus curiae* in *Gateway Coal Co.* v. *United Mine Workers of America*, 412 U.S. 903 (1973), a suit brought under the Labor-Management Relations Act and the Federal Coal Mine Health and Safety Act of 1969. A substantial number of the member concerns of the NAM have a real and direct interest in the instant litigation and believe that, as before, the views of the NAM, its experience with the critical issues involved herein, and its general manufacturing and technical expertise may be of assistance to this Court.

This case presents issues of national importance which are of direct concern to the NAM and its members because the Clean Air Act applies to all industrial stationary sources ("any building, structure, facility, or installation which emits or may emit any air pollutant"). Clean Air Act §111(a)(3), 42 U.S.C. §1857c-6 (Supp. 1975). Section 111(a)(1) of the Clean Air Act (42 U.S.C. §1857c-6) requires the Administrator to "take into account the cost of achieving the emission reduction" he prescribes when promulgating emission standards for new stationary sources. Just how this cost factor is to be taken into account is the fundamental issue involved in the present case. It is an issue of great concern

to a substantial number of NAM members who expend increasingly large sums for pollution control and need meaningful, careful consideration to be given to the cost of, and public benefit expected from, EPA regulation as the Clean Air Act and National Environmental Policy Act (42 U.S.C. §4321, *et seq.*) would require.

Although this case deals with specific emission standards promulgated for the cement industry, if the construction and interpretation of the Clean Air Act by the Court below are correct, the Administrator, in effect, can disregard the statutory mandate contained in Section 111(a)(1) of the Act and predicate such standards essentially upon environmental considerations, unless an industry can prove such regulations will endanger its economic survival. Thus the ramifications of the decision below are not limited to the cement industry, but can have application to many other industries which are subject to the Act. It is, therefore, of vital importance to have Section 111(a)(1) interpreted by this Court.

Accordingly, the NAM has an interest in the proper resolution of the issues before the Court in this case and urges that leave be granted to file the accompanying brief as *amicus curiae* and respectfully so moves this Court.

Respectfully submitted,

NATIONAL ASSOCIATION OF MANUFACTURERS
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INTEREST OF AMICUS CURIAE

The interest of the National Association of Manufacturers (NAM), in this case is set forth in the foregoing Motion for Leave to File Brief Amicus Curiae

II. REASONS FOR GRANTING THE WRIT

The Court Below Erroneously Interpreted Section 111(a)(1) of the Clean Air Act.

The Appellate Court decision, in effect, holds that the EPA Administrator, when promulgating emission "standards of performance" for new stationary sources, may elect to ignore or reject all evidence relating to cost versus benefit and may predicate emission standards essentially on environmental considerations, as long as the involved industries are able to "bear the costs and survive."[1] This conclusion is contrary to the express provisions of the Clean Air Act, and the congressional intent as manifested by the legislative histories of both the Clean Air Act and the National Environmental Policy Act (NEPA). It is, therefore, necessary for this Court to construe Section 111(a)(1) of the Clean Air Act, thereby clarifying the role of the Administrator in promulgating standards, and providing the essential criteria on which courts of appeal will review and rule upon the validity of emission standards.

(a) The Congressional Intent of the Clean Air Act and the National Environmental Policy Act Requires that Economic Factors Be Given Significant Weight by the Administrator.

Section 111(a)(1) of the Clean Air Act (42 U.S.C. §1857c-6) requires that when setting emission standards for new stationary sources, the EPA Administrator must "take into account the cost of achieving the emission reduction" he prescribes. It is clear on its face that there are two factors to be considered simultaneously. These are *the specific cost* of achieving *that particular emission reduction* prescribed. In other words, the Administrator must consider that to achieve *X%* pollution reduction (i.e., benefit) it costs *Y* amount of dollars (cost). Since the pollution reduction is a

[1] EPA Response to Remand in *Portland Cement Association* v. *Ruckelshaus*, 486 F.2d 375 (1973); Joint Appendix to the Brief Following Remand, p. 201.

benefit to the public, it follows that Section 111(a)(1) requires a cost-benefit analysis. EPA ignored this section of the law when it rashly stated that cost-benefit analyses cannot be established or justified in promulgating emission standards, and that as long as the costs are not so great that an industry could not bear them and survive, such standards will be promulgated.[2] Since EPA's statement effectively eradicates Section 111(a)(1) of the Act, the Court of Appeals for the District of Columbia Circuit was incorrect in upholding the EPA view.

Indeed, one of the stated purposes of the Clean Air Act is "to promote the productive capacity of our nation's population." §101(b)(1), 42 U.S.C. §1857. Apart from Section 111(a)(1) mentioned above, there are further indications of congressional intent that economic factors should be given sufficient consideration in actions by the Administrator. One such example of congressional intent appears during floor debates before passage of the Act, in remarks by Senators Jennings Randolph and Edmund Muskie:

> Mr. Randolph . . . I know at times on the subcommittee and on the committee we have talked about the economics of this legislation as well as to the health standards of this legislation, and I know that the Senator from Maine has been one of those who have recognized that this legislation is both an *economic* measure and an air pollution measure . . .
>
> Mr. Muskie . . . The Senator is correct. (116 Cong. Rec. 42392, December 18, 1970). (Emphasis added.)

Another example of congressional intent is found in an amendment which would have deleted consideration of economic impact. This amendment was proposed by Congressman Ryan of New York, who stated:

> I believe that the threat to our environment is so

[2] *Ibid.*

> great that, as a matter of public policy, industry should be required to use the most advanced technology regardless of whether or not a particular industry finds it economically feasible.

The proposal was rejected on voice vote. (116 Cong. Rec. 19242-43, December 2, 1970).[3]

The U.S. Court of Appeals for the D.C. Circuit has stated that in order to give full effect to the Clean Air Act, it must be read, at minimum, *in pari materia* with NEPA. See *Portland Cement Association* v. *Ruckelshaus, supra,* at 380. NEPA states that all agencies of the Federal Government shall: "identify and develop methods and procedures, in consultation with the Council on Environmental Quality, which will insure that presently unqualified environmental amenities and values may be given appropriate consideration in decisionmaking *along with economic and technical considerations;*" 42 U.S.C. §4332(2)(B) [Emphasis supplied]. NEPA also states that all agencies of the Federal Government shall include in every recommendation or report on major Federal actions significantly affecting the quality of the environment, a detailed statement by the responsible official on:

(i) the environmental impact of the proposed action,

(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,

(iii) alternatives to the proposed action,

(iv) *the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity;* [Emphasis supplied] and,

(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented. 42 U.S.C. §4332(2)(C)(i)-(v).

[3] Referred to in *Portland Cement Association* v. *Ruckelshaus,* 486 F.2d 375, 380 (D.C. Cir. 1973); *cert. denied,* 417 U.S. 921 (1974).

While EPA is not required to file a formal NEPA impact statement, it is required to prepare the "functional equivalent of a NEPA impact statement." *Portland Cement* v. *Ruckelshaus, supra,* at 380. Such a "functional equivalent" must give consideration to all five NEPA issues quoted above. *Environmental Defense Fund (EDF)* v. *E.P.A.,* 489 F.2d 1247, 1256 (D.C. Cir. 1973). And the legislative history of NEPA as gleaned by the courts leaves no question that this Act requires that full, careful consideration be given by EPA to economic factors:

> The legislative history of NEPA clearly reveals that Congress intended the 'development of adequate methodology for evaluating the full environmental impacts and the full *costs*—social, *economic,* and environmental—of federal actions *Sierra Club* v. *Froehlke,* 359 F. Supp. 1289, 1366 (1973) . . . NEPA is at the very least 'an environmental full disclosure law' . . ., *Ibid.,* 359 F. Supp. at 1338, and the courts must see that important legislative purposes are not lost or misdirected in the vast hallways of the federal bureaucracy . . . *Ibid.,* 359 F. Supp. at 1332.

In the instant case, EPA has "misdirected an important legislative purpose," i.e., evaluating full costs, *economic and environmental.*

(b) EPA Has Ignored the Council on Environmental Quality (CEQ) Policy on Cost-Benefit Analyses, and the Views of Its Own Task Force. When Failing to Require A Balancing of Costs and Benefits of the New Source Emission Standards Under Consideration.

The Council on Environmental Quality, formed under NEPA, (42 U.S.C. §4342) has stated the following policy:

> Decisions on attaining different levels of environmental quality need to take into account the benefits to be attained and the costs to be incurred. *When the expected gains are large relative to the costs,* it is clearly in our interest to move forward in cleaning up

> the environment. And such improvement should, of course, *continue as long as the perceived added gains of attaining each higher level of environmental quality exceed the expected costs.*" (*Environmental Quality*, 1971, at 119 (U.S.G.P.O.)). [Emphasis supplied.]

The italicized words demonstrate the need for the weighing and balancing of costs versus benefits.

An EPA Task Force Report entitled "Application of NEPA to EPA's Environmental Regulatory Activities" (February, 1973), at 57, states that full compliance with NEPA might necessitate a balancing of costs and benefits of the standards being considered:

> 4. Benefit: Full compliance with NEPA would result in providing more information to the public, industry, and other government agencies in regard to the source categories selected, standards proposed, and consequences and benefits of these actions. *Full compliance might necessitate a balancing of costs and benefits to the standards being considered;* the benefits to the public health and welfare would be stressed. The basis and rationale for setting standards would be documented for internal and public use. (Emphasis supplied.)

EPA rejects both the policy of CEQ, and the views of its own task force when failing to adequately consider petitioner's cost-benefit analysis, or prepare one of its own.

(c) The Lower Court Erred in Upholding the Administrator's Actions Which Failed to Comply with the Statutory Mandate.

Despite a clear expression of legislative intent, the Administrator when promulgating the cement standards failed to follow the statutory mandate with respect to economic considerations. Indeed, EPA hastily rejected Portland's cost-benefit analysis which showed the regulation would impose a cost increase of nearly 20% in order to achieve an emission reduction of one tenth of 1%—a ratio of more than

100 (cost) to 1 (benefit). EPA then made the following statement against cost-benefit analyses:

> We believe that Congress intended §111 to be used to establish emission limitations which are the lowest that can be achieved by that industry. Where the cost of meeting such standards *would be so great that the industry could not bear the costs and survive*, such standards could not be implemented by the industry regardless of technological feasibility. There are also cases where a reduction in emissions that would be achieved by a particular control technique would be so grossly disproportionate to the cost of the control technique that it would not be required. However, these determinations are necessarily judgmental and are left specifically to the Administrator in §111. *EPA does not believe that cost-benefit analyses can be established or justified on the basis of such an analysis.*[4]

By virtue of this statement, EPA can effectively promulgate the lowest standards technically achievable by industry, without regard to the degree of necessity for such standards (which could be determined by a cost-benefit analysis). Such standards will be promulgated as long as the industry is able to "bear the costs and survive." This concept rejects a careful, meaningful consideration of cost as required by NEPA and the Clean Air Act; it totally ignores §111(a)(1) of the Clean Air Act which plainly requires a comparison of cost and benefit, and it creates a rebuttable presumption that a standard is warranted, shifting the burden to industry to prove that promulgation of the standards would result in that industry's economic destruction. The lower court was incorrect in upholding this concept, stating that industry must show "an inability to adjust itself in a healthy economic fashion . . ." See *Portland Cement Association* v. *Train*, 513 F.2d 506, 508, (1975). Thus the fundamental and necessary procedure of weighing and balancing costs versus benefits is cavalierly rejected in favor of a negative

[4] *Portland Cement* v. *Ruckelshaus, supra*, n. 1 and 2.

burden of proof for industry. It is respectfully submitted that the inability of the regulated industry to carry an impossible burden of proof cannot substitute for the clear statutory duty of the regulatory agency.

(d) The U.S. Court of Appeals for the D.C. Circuit Has Referred to the Necessity for Weighing and Balancing Costs versus Benefits in Environmental Actions.

The U.S. Court of Appeals for the D.C. Circuit has stated:

> 'Environmental amenities' will often be in conflict with 'economic and technical considerations'. To 'consider' the former 'along with' the latter must involve a balancing process. In some instances environmental costs may outweigh economic and technical benefits and in other instances they may not. But NEPA mandates a rather finely-tuned and 'systematic', balancing analysis in each instance. *Calvert Cliffs' Coordinating Committee* v. *United States Atomic Energy Commission*, 449 F.2d 1109, 1113 (1971).

While the *Calvert Cliffs* case concerned an Atomic Energy Commission rule to govern consideration of environmental matters (and did not concern emission standards), it must respectfully be submitted that new source emission standards are also major environmental actions subject to NEPA, and they, too, should be deemed to require a cost-benefit balancing analysis, particularly inasmuch as Section 111 (a)(1) of the Clean Air Act provides for it.

Indeed, while Tennessee Valley Authority, the Army Corps of Engineers, and other agencies have all utilized the "cost-benefit" principle, EPA has not been willing to consider the costs versus benefits when promulgating new source emission standards. It emphatically states such a balancing is an impossibility, but it is clear that it has not even set the wheels in motion for developing an adequate methodology for evaluating costs and benefits as required

by NEPA, since it defiantly believes that cost-benefit analyses for new source standards are not justified. Meanwhile, pollution costs are doubling and tripling, unemployment is high, use of energy is costly, and capital availability is increasingly difficult. However, as long as an industry can still "bear the costs and survive," a proposed standard is acceptable to EPA. This is contrary to the public interest as well as the interests of individual companies in an industry. It is also contrary to the congressional intent of the Clean Air Act and the National Environmental Policy Act, as stated above.

(e) The Cost Burden to Industry is Not Being Given Meaningful Consideration by EPA.

The chemical industry's capital expenditures in air and water pollution control have more than doubled in the past three years, going from $282 million in 1971 to $631 million in 1974.[5] The nation's steel industry must spend under present regulations $12 to $14 billion on pollution control equipment over the next nine years in order to meet 1983 standards.[6] U.S. petroleum refineries will invest approximately $3.4 billion for pollution control equipment between 1974 and 1983, and it will cost an additional $5.9 to $7.5 billion more to produce petroleum products from 1974 through 1983 if refineries meet government pollution control standards.[7] In 1975 electric utilities plan to spend $970 million on air pollution control and $565 million on water pollution control.[8] For industry in general, The U.S. Council on Environmental Quality estimated in 1973 that the private sector's capital investment will come to $112 billion from

[5] *Chemical and Engineering News*, December 2, 1974, p. 12.

[6] Business Publications, Inc., *Air/Water Pollution Report*, May 19, 1975, p. 197.

[7] Joan Norris Boothe, "Cleaning Up: The Cost of Refinery Pollution Control," Council on Economic Priorities, 1975, p. 2.

[8] Business Publications, Inc., *Air/Water Pollution Report*, May 26, 1975, p. 207.

1972-1981.[9] In 1974, CEQ estimated that, for the period from 1973-1982, the environmental pollution control expenditures required under the Federal program would be $194.8 billion.[10] Instead of relating such costs to benefits in the instant case, EPA's position is that as long as industries are "able to bear the costs and survive," the standards will be promulgated. It is submitted that this is an unrealistic approach, and one which undermines one of the stated purposes of the Clean Air Act: "to promote national productive capacity."

CONCLUSION

For the foregoing reasons, and for the reasons set forth by the Petitioner, this Court is respectfully requested to grant the Petition for Writ of Certiorari.

Respectfully submitted,

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[9] U.S. Council on Environmental Quality, *Environmental Quality*, fourth annual report, 1973, p. 93.

[10] U.S. Council on Environmental Quality, *Environmental Quality*, fifth annual report, 1974, p. xvii.